

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 5213

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al.*,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**MICROSOFT’S REPLY IN SUPPORT OF ITS MOTION FOR
AN ORDER GOVERNING FURTHER PROCEEDINGS**

Appellees seek to short-circuit the appellate process by curtailing both the scope of Microsoft’s submissions and the time allowed for their preparation. Their only proffered ground for so limiting this process is “the compelling public interest in prompt disposition of this important case.” (Resp. at 3.) This is indeed an important case, as the Court and all parties have agreed. But particularly in such an important case, if there is no threat of irreparable harm—and none has been shown here—the “compelling public interest” is in a *proper* disposition of the case, not in one reached in haste. To ensure a proper disposition, the Court should implement an appellate process conducive to a thorough, thoughtful and careful review of all the issues presented.

Notwithstanding appellees' claim that immediate relief "is essential for effective antitrust law enforcement" in the computer industry (Resp. at 2), the district court, over appellees' objection, stayed the final judgment in its entirety pending appeal. Given that the decision below threatens Microsoft's very existence, Microsoft has a responsibility to its employees, shareholders, business partners and customers, as well as to this Court, to propose an appellate process that is adequate to resolve the many issues presented. The proceedings Microsoft has proposed are the minimum necessary to achieve that objective.

1. Length of Briefs. Microsoft set out in its motion the 19 principal legal issues it intends to raise on appeal. In addition to those issues, Microsoft also must set out the facts of the case, which the district court required 207 pages to present in its findings (despite its omission of certain facts that Microsoft will call to the Court's attention). Appellees do not claim that any of Microsoft's 19 issues are insubstantial. They instead simply assert, without a word of explanation, that those issues *and* the facts of the case can be "fairly accommodated" in a principal brief of 24,000 words or approximately 72 pages. (Resp. at 5.) Having repeatedly led the district court into error, appellees now seek by *ipse dixit* to restrict this Court's ability to consider those errors by limiting Microsoft's opportunity to present its arguments.

The word limitations proposed by Microsoft are the product of the considered judgment of counsel. Mindful of their duty of candor, counsel represent to the Court that 56,000 words constitute the minimum space required to state the case and present Microsoft's arguments as concisely as possible. Assuming that Microsoft devotes approximately half of its principal brief to its jurisdictional statement, statement of the

issues, statement of the case, statement of the facts and statement of the standard of review, Microsoft's proposed word limit would leave it only 28,000 words to argue the 19 significant issues presented.¹

This appeal presents factual issues relating not only to two allegedly separate product markets—"Intel-compatible PC operating systems" and "Web browsers"—but also to many complicated technologies included in neither market, such as Intel's Native Signal Processing software, Sun's Java technologies, Apple's QuickTime multi-media software, and RealNetworks' streaming media software. The appeal also presents serious legal issues relating, *inter alia*, to the integration of new functionality into products, the definition of relevant product markets in rapidly changing technology industries, the interaction between federal copyright laws and antitrust laws, and the appropriate standards under Sections 1 and 2 of the Sherman Act for tying, exclusive dealing, monopolization, attempted monopolization and relief. Finally, the appeal raises important issues concerning the administration of justice relating to the conduct of the trial, the imposition of sweeping and punitive relief without a hearing, the abdication of the judicial function in deference to the Executive Branch in fashioning relief, and the district court's continuing public commentary about the merits of the case in violation of Canon 3A(6) of the Code of Conduct for United States Judges. In seeking to limit Microsoft to 24,000 words, appellees apparently hope to force Microsoft either to abandon legitimate

¹ Appellees state that a principal brief of 56,000 words would result in "well over 200 pages in non-proportionally spaced type." (Resp. at 4.) Microsoft estimates that a principal brief of 56,000 words would be approximately 170 pages in proportionally-spaced, 12-point font with one inch margins. Circuit Rule 32(a)(1).

appellate issues or to give them shortshrift, thus adversely affecting this Court's ability to review the decision below.

Appellees assert that the briefing format proposed by Microsoft "would burden the Court and inevitably delay disposition of the appeal." (Resp. at 5.) To the contrary, thorough briefing by the parties will minimize the amount of independent record review and legal research that must be performed by the Court. The need for a detailed discussion of the relevant facts by Microsoft is particularly acute here given the district court's failure to include any citations to the record in its findings. *See United States v. Marine Bancorp.*, 418 U.S. 602, 615 n.13 (1974) ("We have also been hampered by the absence of transcript citations in support of the District Court's findings.").

Despite appellees' professed desire to avoid overburdening this Court with submissions, they propose that the States be permitted to file a separate brief of 7,000 words "on issues of particular interest to them"—which they do not identify—and that no limitation be placed on the number of amicus briefs. (Resp. at 5, 6.)² Appellees then assert that Microsoft's reply—which will need to respond to appellees' consolidated brief, the States' separate brief and, in appellees' view, numerous amicus briefs—"should be limited to the standard 7,000 words." (Resp. at 5-6.) The States have already conceded that their statutes are coterminous with the relevant provisions of the Sherman Act. *See United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 55 (D.D.C. 2000). Appellees

² Microsoft agrees that amici should be required "to file their briefs at the same time as the principal brief of the party they support." (Resp. at 6.) Microsoft continues to submit, however, that the number of amicus briefs should be limited. If numerous amicus briefs are filed by Microsoft's competitors and their trade associations, Microsoft may need more space to address them in reply, particularly if those "briefs" rely, as they did in the district court, on extrajudicial information.

thus should be held in the aggregate to the same space limitations that apply to Microsoft's principal brief. Appellees also advance no reason why this Court should depart from the standard rule that a reply brief may be half the combined length of appellees' principal briefs. FED. R. APP. P. 32(a)(7)(B)(ii).

In short, it is clear from appellees' proposal that they seek not to minimize this Court's burden, but to impose unfair limitations on Microsoft's ability to present its arguments on appeal. To ensure full presentation of its appellate arguments for this Court's benefit, Microsoft requires a principal brief of 56,000 words.

2. Briefing Schedule. The briefing schedule proposed by Microsoft readily permits "prompt disposition" of this appeal. At the same time, that schedule is adequate to enable counsel to lay out issues and analyze them in a professional manner so as to discharge their responsibilities to their clients and the Court. Appellees complain that "[a]lmost four months have passed since the district court entered its final order," and they argue that "the Court should set a schedule that will allow briefing to be completed this calendar year." (Resp. at 2, 5.) Of course, were it not for the three-month delay engendered by appellees' strenuous effort to avoid this Court's review, briefing would have been completed in November of this year *under Microsoft's proposed schedule*. It is truly remarkable that appellees now seek to shift to Microsoft the blame for, and the burden of, the delay that resulted from their tactical decision to seek direct review in the Supreme Court.

3. Other Issues. It is simply not practical for Microsoft to file the joint appendix together with its reply brief, as appellees suggest (Resp. at 7), and FRAP 30(c)(1) does not so require. Microsoft instead requests that it be given 10 days

after its reply brief is served to file the joint appendix. Microsoft addressed the other matters—oral argument and the possibility of supplemental briefs—in its motion because the Court directed Microsoft to file “a motion to govern further proceedings herein.” Microsoft trusts that the Court will address these matters whenever it deems appropriate.

Respectfully submitted,

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October 5, 2000

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2000, I caused a true and correct copy of the foregoing Microsoft's Reply in Support of Its Motion for an Order Governing Further Proceedings to be served by facsimile and by hand upon:

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